

REMARKS

The Examiner has indicated that the Applicant was required in the previous Office Action (March 28, 2006) to "either cancel the conflicting claims from all but one application or maintain a clear line of demarcation between applications." Such requirement was not met by the Response to the Office Action, mailed July 27, 2006.

In the Office Action of March 28, 2006, the Examiner has rejected Claims 30-34, 40, 41, 45, 49, and 51-64 of the present application under 37 CFR §1.78(b) as conflicting with claims 1-45, 48, and 50-88 of Application No. 10/035,822, and cited MPEP §822. MPEP §822 clarifies that such a rejection "should only be used when the conflicting claims are identical or conceded by applicant to be not patentably distinct." Neither of these conditions is present.

The conflicting claims are not identical. Claims 49 and 51-63 of this application drawn to a product, method of making the product, kits and devices containing the product, have been withdrawn. They have been maintained in the application as they may be eligible for rejoinder upon allowance of the the pending method claims 30, 40, 41, 45 or 64. These claims are not identical to pending claims 45, 48, and 50-84, 86-88 and withdrawn Claim 85 of Application No. 10/035,822, drawn to a product, method of making the product, kits and devices containing the product. Similarly, method claims 30, 33, 34, 40, 41, 45 and 64 of the present application are not identical to the withdrawn claims 1-44 of Application No. 10/035,822. As the claims are not identical and Applicant has not conceded that the claims are not patentably distinct, the rejection should not have been made.

Moreover, according to 37 CFR §1.78(b), the elimination of conflicting claims from one or more applications filed by the same applicant may be required in the "absence of good and sufficient reason for their retention" during pendency in more than one application. Applicant now provides good and sufficient reasons that the claims should be retained during pendency in both applications.

As discussed above, the withdrawn claims in each application have been maintained because they may be eligible for rejoinder upon allowance of the elected claims. To be eligible for rejoinder, they must ultimately either depend from the allowed elected claims or otherwise include all of the limitations of such claims. Thus, the question of the claims 30-34, 40, 41, 45, 49, and 51-64 of the present application are patentably distinct from claims 1-45, 48, and 50-88 of Application No. 10/035,822 can only be evaluated once the claims in both applications are

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prosecuted on the merits and, possibly, amended. In the meantime, the withdrawn claims will not be prosecuted and there is no burden on the Examiner in having them remain in the applications. Therefore, the rejection of Claims 30-34, 40, 41, 45, 49, and 51-64 of the present application under 37 CFR §1.78(b) should be withdrawn.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

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By: 

Marina L. Gordey
Registration No. 52,950
Agent of Record
Customer No. 20,995
(805) 547-5580

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083106